Office-Supreme Court, U.S.
FILED
JAN 29 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 757.

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE COMPANY,
LTD., et al.,
Respondents.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF HELEN CORINNE SCALES TRICE, EXECUTRIX, PETITIONER.

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May It Please the Court:

Respondents in their brief in opposition to the grant of certiorari say that the trial judge exercised his discretion to grant a new trial because of "the persistent misconduct of counsel representing the plaintiff." At page **692** of **213 F. Supp.** appears the judge's statement of what he considered improper conduct on the part of counsel for petitioner, who signs this brief. The gist of the finding is that it was wrong for petitioner and her counsel to

interview James Nelson, whose deposition had been taken by the defendant insurance companies, and take a statement from him repudiating the testimony he had given.

The judge's statement fails to show that petitioner and her counsel used any improper means to cause Nelson to repudiate his testimony previously given by deposition. The defendants called him to the witness stand and were allowed to subject him to merciless cross-examination before the jury. Petitioner and her counsel, by going to Nelson and taking the statement from him, brought out the truth and exposed the improper means which had been used by the defendants to get him to make a confession that he had set fire to the mill. The jury so found.

The judge, having the last word, said the jury in believing Nelson's testimony on the stand acted capriciously and set their verdict aside. He sent his opinion to West Publishing Company to be published. Thus, he put an aspersion on petitioner's counsel that will remain in the law books for all time to come.

The Court of Appeals by refusing to pass on questions raised by petitioner on her appeal let the decision and opinion of the judge stand unreversed.

Now, petitioner and her counsel can only hope for justice from this high Court. They realize that this Court cannot undertake to remedy every injustice that is brought up before it. Here, however, the judicial wrong to an officer of the court is a wrong to the court itself. It tends to undermine the jury system which is one of the main bulwarks of liberty in this country. It is a wrong of such nature as will have repercussions in generations to come.

The judge, in his 29-page opinion, left out facts that put the conduct of petitioner's counsel in an entirely different light. Instead of the evidence being overwhelm-

ingly **against** the verdict, it was overwhelmingly **in support of** the verdict.

Petitioner has refrained from attacking opposing counsel. The animadversion upon her counsel in the judge's opinion and the use made of it in the brief of the insurance companies in this Court surely justify her in stating the facts about the case.

THE FACTS.

The insurance companies, having made their election to defend the action by setting up the defenses of false swearing in the proof of loss and intentional burning of the mill by the insured Joe W. Scales, carried the burden of proving their allegations by a preponderance of the evidence. After the death of Joe W. Scales and nearly three years after their answers alleging that he procured the mill to be burned, they turned up the evidence, which they thought would enable them to carry their burden.

In the Wales community where petitioner's family resided and where the mill was located there was a man named R. C. Jones. Petitioner and her sister and brother held a mortgage on the house in which Jones and wife lived. It was in default. Jones filed a huge claim against the Estate of Joe W. Scales that he could not substantiate. Petitioner and her sister and brother filed suit to foreclose their mortgage. The litigation went to the Supreme Court of Tennessee resulting in Jones losing. He and wife after the foreclosure sale had to move out of the house.

In this situation, the defendants' lawyers contacted Jones through whom (and with the assistance of his brother-in-law, who was the sheriff of the county) they succeeded in getting James Nelson, an illiterate Negro farm hand, to give them a statement on a wire recorder

that he took part in burning the mill. Then they took Nelson's deposition.

The story told by Nelson was incredible: By prearrangement of Mr. Scales, and Jones, so the story went, he and a white man entered the mill after dark. It was in hot weather, July 14, 1956. In the mill awaiting them they found some bales of hay and six or seven ten-gallon milk cans of gasoline. They broke the bales of hay and spread it around. Next they emptied the milk cans and put the gasoline around over the hay. They waited 15 minutes. Then, they turned the switch to start the conveyer and each struck a match to the gasoline. When the fire was well started, they walked out the door they came in, unharmed. Petitioner believes it may be safely asserted that the only other operation of this kind of record is when Shadrach, Meshach and Abenego walked in the fiery furnace. The souls of the Buddhist priests of South Vietnam who chose gasoline and matches as a certain means of suicide testify from heaven against such an occurrence.

Defendants' lawyers gave Nelson's statement to an assistant state prosecuting attorney. The grand jury indicted Nelson and two white men, Arthur Watts and Lewis E. Hewgley, charging them with arson. While the indictment was being returned, the defendants were taking Nelson's deposition for use in this case.

Petitioner and her counsel were at a loss to understand why Nelson would tell such a fantastic tale, resulting as it did in his own indictment for arson. They decided to go to see the people Nelson worked for and try to find out more about the matter. On this occasion Nelson, upon the urging of the people for whom he worked, told why he first made the statements to the defendants' lawyer confessing to burning the mill.

JAMES NELSON'S STATEMENT.

James Nelson's statement, which the judge held it was wrong for petitioner and her counsel to take, is as follows:

Statement of James Nelson.

I, James Nelson, make the following statement on March 22, 1960 at the home of Mr. and Mrs. Jones Boyd in the presence of Mr. and Mrs. Boyd, Mrs. Helen Scales Trice and Mr. Fyke Farmer.

Mr. Farmer has showed me a copy of an indictment against me, Mr. Lewis Hewgley and Mr. Arthur Watts for setting fire to and burning the mill property of Mr. Joe Scales on July 14, 1956. Mrs. Jones Boyd has read the indictment to me and explained the matter to me.

On March 1, 1960, Sheriff Butler came down to my home on the farm of Mr. Roy McRee, father of Mrs. Boyd, and I was not at home so he didn't see me. He left word with my wife for me to go over to Pulaski the next day. I went over to Pulaski the next morning and saw Sheriff Butler in front of the court house door and he told me to go to the office of Mr. Clayton Lee. I was going through the courthouse to go out the north door and someone called me. I looked around and it was Mr. Lee. Mr. Lee told me to go with him into "this little room" in the courthouse. I went into the little room with him and he shut the door and commenced asking me questions. He asked me where I stayed and what I was doing. Then he asked me if I knew Mr. Joe Scales. I told him I did. Then he asked me if I knew anything about the mill burning and I told him I didn't. Then he said, "Aw, come on, I've been told all about it." I just sat there and looked at him. Then he said, "You might as well tell it, how you and Arthur Watts got in there and every-

thing." I told him I didn't know Arthur Watts, that I had never seen Arthur Watts, if I did I didn't know him. Then he said, "You ought to know him, since you and him burnt the mill". I didn't say anything. He sat there a few minutes and said, "Where was you at the 14th of July, that night." I said, "I don't know, sir, I guess I was at home." He said, "Are you right sure?" I said, "I guess so." Then he said, "Wait there just a minute, I'll be back." He went out and I sat there a few minutes and waited on him. In a few minutes he came back with some kind of a machine in a case. He opened it up and after he had punched some buttons around and had got it fixed, he started asking me questions. He started telling me what he wanted me to say and would ask me to repeat it. When I did he would turn the machine on. Then he would go to something else and have me repeat that and when I did he would turn the machine on to take it down.

Mr. Lee made up the whole story about Mr. Scales meeting me in town on Saturday morning and telling me the mill just had to be burned and that he wanted me to do it and would give me $50.00 to burn it, about me going out to Mr. Jones and Mr. Jones taking me in his station wagon down on the Wales Road where we met two other men in a station wagon and me driving off with one of these men, about me and this man going out to the mill after dark, breaking bales of hay and spreading hay around, about there being milk cans of gasoline there which we poured on the hay and around on the floor and starting the elevator and then me striking a match and the white man striking a match to start a fire and then going back over town and the white man giving me $50.00. All this was made up by Mr. Lee and he would ask his questions into the machine and then cut it off until I repeated the answer he wanted me to give and turning

the machine back on to take it down, like he wanted it. He told me, to go ahead and repeat what he said because it didn't amount to anything.

After a while he called another man in and went over all these questions and answers while the other man was listening. While the other man was there he didn't cut the machine on and off. Mr. Lee never did tell me what he was going to do with what he had taken down on the machine. He just told me it didn't amount to anything. When he let me go it was way up in the morning. Mr. Lee said, "That's fine, I'll see you."

On the following Saturday, Mr. Lee came down to Mr. McRee's place and saw me about sundown in Mr. McRee's barn lot. He talked around a while and then asked me when I was going to Pulaski. I told him if the weather was bad so I couldn't work I might get over there. (I don't go to Pulaski very often.) On the next Tuesday the snow was on the ground and I caught a ride and went over to Pulaski. I went to the courthouse and as I was leaving through one door I met Mr. Lee coming in the door. Mr. Lee spoke to me and said, "What are you doing?" I said, "Not anything." He asked me if I could go to Nashville with him. I said I could. He said, "Let's go." His car was parked in the square. We got in it and he went to his home to get his wife. Then I rode to Nashville with Mr. Lee and his wife. He didn't tell me what he wanted me to go to Nashville for. He just said we wouldn't be gone long. When we got to Nashville he took me to a big building near the capitol. He left me in a little office by myself for sometime. Mr. Lee walked out in the hall with some other men. When Mr. Lee came back, he said, "It ain't going to be long now. They'll be here with that other man in a few minutes." We waited around for a long time. Finally

he took me upstairs to another office and pointed out the window. He told me what kind of car it would be. When two men got out of the car, he said, "Ain't that the man?" I said, "I don't know." He said, "You know that is the man, you might as well repeat it, there ain't going to be nothing to it." Then we went back to where we had been and Mr. Lee put me back in the little room. He left me there for a while. Then he came and took me into the room where the other man we had seen from upstairs window was with several other men were. Mr. Lee said to me, "Ain't that the man." I said, "Yes, sir, that is the man I seen getting out of the car." He said, "that ain't what I am talking about." He said, "You know that's Arthur Watts." I said, "If you say it is, but I don't know the man." Then they asked the white man if he knew me. He said he didn't. They told him, "Yeah, you know him, you might as well come on and tell the truth about it, we are trying to help you." They told Mr. Watts that his wife had said they were in one picture show and he had said they were in another. Then they took me back to the little room and directly Mr. Lee came and took me home. Mr. Lee brought me all the way to my home, about 14 miles south of Pulaski. We got here about 6. I was over in Pulaski on Monday, March 14th. My brother's trial was to come up that day. I saw Mr. Lee around the courthouse and he talked to me about my brother's trial. After my brother's trial was put off, Mr. Lee asked me who was his lawyer and said if he knew he might talk to him. I told him I didn't know who was his lawyer as I didn't see him very often since I lived way down at Stella. Mr. Lee then told me he wanted me to come back on Wednesday about one o'clock. I went back on Wednesday because I thought he might help my brother and might take his case. He took me over to the courthouse without telling me they were going to

take a deposition from me. I am unable to read and write.

s/ James Nelson

Witness: s/ Helen Scales Trice, Mrs. Jones Boyd, Jones Body, Fyke Farmer.

Sworn to and subscribed before me by James Nelson on March 22, 1960.

s/ Helen Scales Trice,
Notary Public.

Petitioner, her counsel, and Mr. and Mrs. Boyd, on the same afternoon Nelson made the repudiation of his confession carried him to see the District Attorney General. Nelson told him the statement defendants' lawyer had obtained from him was not true and that the statement he had made that afternoon was true.

Hewgley and Watts, the two white men indicted with Nelson, denied any knowledge of how the fire occurred.

Two or three days after Nelson recanted, one of defendant's lawyers accompanied by the sheriff called on James Nelson. The sheriff told him if he didn't go on and say that he burned the mill, they would put him in the penitentiary. Subsequently, a deputy sheriff and a criminal investigator for the state called on him and he signed for them a statement repudiating his recantation.

THE INDICTMENT DISMISSED.

The District Attorney General, after he learned the facts, nolled the indictment against all three defendants. This was done before the trial of this case.

THE INTIMIDATION OF JAMES NELSON.

On Friday before the Monday on which the trial of this case was to commence, two of defendants' lawyers went down to see James Nelson. According to Nelson, they told him, "You are going to have to own up to this. Because, if you don't, they are going to put you in the penitentiary." He was corroborated by Mr. Roy McCree, the 78-year-old white owner of the farm where Nelson worked who said the conversation occurred on his back porch.

Defendants' counsel, Mr. Lee, admitted that he, accompanied by Mr. McFarland, went down to Mr. McCree's where James Nelson worked on Friday before the date of the trial and pointed out to him the penalty of perjury. His testimony was:

> "Q. He was told that?
>
> A. Yes, siree.
>
> Q. Now, did any of you or either of you threaten to put him in the penitentiary or was it an explanation of the consequences of coming into Court and uttering false, dishonest and perjured testimony?
>
> A. That's right."

NELSON'S TESTIMONY ON THE TRIAL.

Although the defendants' cross-examination of Nelson on the witness stand trying to make him "own up to it" extended over two days, Nelson did not break, but maintained his innocence. He told the jury that the statement he gave to petitioner and her counsel was true.

James Nelson, on the witness stand, testified:

> "Q. Did you have some conversation with Mr. Jones Boyd after Mrs. Trice and I were down there about this statement?

A. Yes, sir.

Q. About the mill burning?

A. Yes. sir.

Q. What did you tell him James?

A. Well, I just went over there and told him what they were trying to fish me up into.

Q. Told him what?

A. I just went over there and told him what they were trying to get me into and I told him what Mr. Butler (the sheriff) said about the trouble. And so I just told him that I burnt the mill because I told him why because they had me scared and I didn't know what to do.

. . . . . .

Q. Why was you scared?

A. Everytime I looked out, two or three different mens coming; and I didn't know what they were going to do. They have the law with them. And I didn't know what they were going to do to me.

. . . . . .

Q. Did they or not have guns on them when they came down there?

A. Yes, sir.

Q. Do you know how many times, how many different occasions officers of the law or the lawyers came down there to see you?

A. No, sir, I don't know just how many times. They used to come regularly. They used to come regularly down there to see me.

. . . . . .

Q. Now, you said here what date was it recently that Mr. MacFarland and Mr. Lee came down there?

A. They come on Friday. I believe it would be two weeks ago, the last time they was down there.

. . . . . .

Q. Did you admit that you burned the mill?

A. Well, that is what he told me I had to do and I didn't know. After he said he was going to put me in the pen.

. . . . . .

Q. You said you were afraid when they told you that you would have to confess up to it or go to the penitentiary?

A. Yes, sir.

Q. Did you believe that?

A. Well, I didn't—I just didn't know.

Q. You say you are afraid of the law?

A. Yes, sir.

Q. Are you afraid of sheriffs?

A. Yes, sir."

OTHER WITNESSES WHO TESTIFIED AND THE SHERIFF WHO DID NOT.

The Boyds testified to the circumstances under which James Nelson made the recantation statement to petitioner and her counsel—in their presence and in their home.

Defendants' attorney, Mr. Lee, testified that Nelson's confession to him was freely given. He denied that he monkeyed with the wire recorder to get the story made up. He put on a demonstration of a recording before the jury to prove that it could not have happened like Nelson said it did.

The sheriff was not called to testify. His discovery deposition taken by petitioner, however, was filed in the case. Upon his discovery deposition being taken it was revealed that the three lawyers representing the insurance companies went out to the sheriff's house one night and told him they had information that James Nelson had burned the mill and asked him if he couldn't get James

Nelson in to talk to them about it. The sheriff had J. D. Nelson, James Nelson's brother in jail. He was charged with murder. Mr. Henry, one of the three lawyers was defending J. D. Nelson, according to his statement made when the sheriff's deposition was taken. He also had represented the sheriff in litigation and in "one thing and another" more than any other lawyer at the Pulaski bar.

The day before J. D.'s murder case was to come up, the sheriff went down in the country where James lived and left word with "the colored folks next door" to tell James to come to Pulaski. James went up to Pulaski early the next morning. The sheriff took him back into a little room in the courthouse and "sat right back there and told him that his brother was in jail, his trial was set, and they didn't have a lawyer, and that if they didn't get a lawyer that his brother was going to the penitentiary."

After the sheriff finished talking to James about his brother's murder case, the sheriff said, "I told him that I had information that he knew something about this fire out here and if he did know, now's the time to talk, because Mr. Joe Scales was dead and he couldn't help him."

Nelson, the sheriff said, did not open his mouth to him but he left him sitting there and went out and told Mr. Henry that James was ready to talk. Then Mr. Lee came over to talk to Nelson in the little room in the courthouse.

R. C. Jones took the stand for the defendants. He tried to help them but testified that he drove over to town in the morning before the fire and brought Nelson out to his house where he saw Mr. Scales hand Nelson some money. This was in the morning. It conflicted with Nelson's statement on his deposition that he did not go out to Jones' house until late in the afternoon and that $50.00 was paid to him over in town by the white man he did not know

after they had set the fire. There were also other points of conflict between Jones' testimony and Nelson's version of the events on the recordings and in his deposition.

Petitioner, in rebuttal, called Watts and Hewgley, both of whom testified that they knew nothing about how the fire started.

Three defense witnesses—all experts in the fields of combustion and arson—upon cross-examination by petitioner's counsel gave testimony as to the improbability of the fire being started with gasoline and hay in the manner described by Nelson in Mr. Lee's wire recordings.

When the defendant's expert on combustion, Dr. F. A. Griffitts, was on the stand, plaintiff's counsel asked him on cross-examination and he answered as follows:

"Q. Liquid gasoline does not burn? It is the fumes or vapors from the gasoline which burns, isn't it Doctor?

A. Properly mixed with air.

Q. Gasoline itself will not ignite?

A. Right.

Q. And if you poured on the floor in a building here, one of these buildings here, on a hot summer night, milk cans of gasoline in one room; say, two, three, four, five, six or seven milk cans of gasoline in one room, you first spread hay around and some hay on the elevator belt; and then you got milk cans of gasoline and saturated the hay; and poured it all around the room; and then you stood in there and took a match and struck it, what would happen?

A. The man who struck the match would probably be pretty badly singed. Without any doubt. Just what would happen would be pretty hard for me to say. It would be pretty hard for anybody to say exactly what would happen unless they were there and saw it. If anybody——

Q. He would be singed because he would be in the fumes which were ignited by the striking of the match?

A. Probably so.

Mr. Farmer: That is all."

Tr. pp. 799-800.

Deputy State Fire Marshal Gray Ragsdale, witness for defendants, testified:

"Q. Have you had any experience in your investigation of investigating gasoline fires?

A. Yes, sir.

Q. What happens when you spread out gasoline on the floor and strike a match?

A. It explodes.

Mr. Farmer: Explodes. That is all."

Tr. p. 656.

Harry Avery, special investigator for National Board of Fire Underwriters, who was called by the defendants, testified that in his first comprehensive report on this fire, he reported that the fire started with a large amount of smoke and small light or flame:

"By Mr. Farmer:

Q. If you didn't say this. On Saturday night somewhere about nine o'clock, July 14, an unidentified woman who was driving down the Lawrenceburg highway stopped at a neighbor's home across the highway and advised that his property was on fire. A large amount of smoke and small light or flame could be observed at the time the fire was discovered. That is in your report, original report, isn't it?

A. Yes, sir.

Q. You have heard of a lot of fires caused by the use of gasoline in starting them?

A. Yes, sir. I have called on a lot of people who set fires, set themselves on fire; got badly burned themselves to death.

Q. Yes, sir, but you wouldn't want to pour out gasoline, large quantities of gasoline in a closed building on a hot summer night; milk cans of gasoline; and stand in the building and turn on a switch; put on hay in the first place; spread hay around and put gasoline all over the hay; and then turn on a switch and start a conveyor and then light a match to it and try to get out of that building alive?

A. I wouldn't want to pour out the gasoline anywhere myself."

Tr. pp. 721, 724.

The story about Nelson and a white accomplice setting the building on fire the way Mr. Lee had it on his wire recorded simply is an affront to common sense and reason. Everybody who has ridden in a commercial airlines airplane knows that the reason for the "No Smoking" sign is to prevent fumes from gasoline from being ignited. Everyone who has seen a gasoline truck with big letters "INFLAMMABLE" or "FLAMMABLE" knows that gasoline is a volatile liquid and the fumes from it are ignited by fire from matches, electric switches, etc., and the result is explosions and very dangerous fires. That is just about everybody in this country. Every child old enough to go to school knows better than to pour out gasoline and strike matches around where the fumes are. Realizing the predicament the defendant insurance companies had found themselves in, Mr. Henry of the defendants' counsel endeavored to get them "off the hook" with the jury. In his argument he said:

"We have the hay that had been placed in this crusher, and Ladies and Gentlemen, don't be deceived about this idiotic argument that they took those

milk cans and poured the gasoline right down in the floor, and stood there and struck a match. Of course that didn't happen and no one ever suggested that happened."

Tr. p. 1624.

Then Mr. Henry proceeded to outline a new theory about how the fire was started with gasoline and hay. He told the jury:

"The gasoline had to go around, it had to be put in a number of different places. The proof shows this building right here, I believe, is 200 feet long. I believe that is what the proof shows, I know it shows that, and it shows there is a back door right back here, we proved that by Mr. Gray Ragsdale.

"There is a conveyor belt there, and I—most of you gentlemen, at least, have been in mills, and know the speed with which conveyor belts move. I submit to you that lighted hay on a conveyor belt wouldn't travel as fast 200 feet as a man could walk away from it. He could have gotten anywhere he wanted to by the time that hay got down there, the lighted hay got down to the place where the gasoline was."

Tr. p. 1624.

Unfortunately for the defendants the record did not bear out his contention. Only the "idiotic" theory was attempted to be proven by the defendants. Nelson, cross-examined on his deposition, said that all their getting ready to set the fire was done in the same room where the milk cans were found, that this room was where the hay was spread and gassed, where the wooden bins were, that they set the fire around the woodwork in the east end of the room. He said they put the hay on the conveyor belt so that when it started rolling, some would

roll off and get started on the floor. The conveyor went west. They did not go into any other part of the building and went out the same door they came in (Dep. of James Nelson, pp. 86-94). In this deposition Nelson said they saw the hay was caught good before they left; that they were right at the door, not as far as eight or ten feet from it (Dep. of Nelson, p. 41).

Neither judges nor juries are bound by testimony that they do not believe. **Quock Tig v. U. S., 140 U. S. 417, 11 S. Ct. 733, 851, 35 L. Ed. 501; Atlantic Works v. Brady, 107 U. S. 192, 2 S. Ct. 225, 27 L. Ed. 438.** Courts will take judicial notice of matters of common knowledge.. **Ohio Bell Tel. Co. v. Public Utilities Com. of Ohio, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093; Milstead et al. v. Taylor et al., 186 Tenn. 642, 653; 31 C. J. S., Sec. 9, Evidence.**

Teasdale v. Beacon Oil Co., 266 Mass. 25, 164 N. E. 612 holds that it is a matter of common knowledge that gasoline is highly inflammable and that its contact with a spark is liable to result in "serious consequence."

The Tennessee Court of Appeals in Gatlinburg Const. Co. v. McKinney, 37 Tenn. App. 343, declared that it is a matter of common knowledge that the residue left in tanks used to store petroleum products is explosive. In that case a little boy was injured by dropping a lighted match down in an old empty gasoline tank. The tank exploded.

If the Pulaski Mill & Elevator Company fire on July 14, 1956 had been set by James Nelson and Arthur Watts by striking matches to gasoline and hay spread out like Mr. Lee had Nelson telling it, there would have been an explosion that would have blown the town of Pulaski into Kingdom Come. Furthermore, the Deputy Fire Marshal and the special investigator for National Board of Fire Underwriters when they arrived on the scene would have

found the blackened corpses of James Nelson and Arthur Watts inside the very room where the gasoline was poured around and where they struck the matches (after sitting around for fifteen minutes giving it ample time to fill the entire room with the vapor) looking like the remains of the bodies of those Buddhist priests over in South Vietnam.

But it was not claimed that Nelson was even singed. No evidence was introduced by these resourceful insurance companies to the effect that Watts was singed. Their customary thoroughness failed them at this point. This, of course, was a mere oversight, which Mr. Henry endeavored to cure before the jury in the manner indicated above —by changing the whole concoction.

The jury didn't believe this concoction. No member of this Court can believe it. The defendants' lawyers didn't believe it. Mr. Henry told the jury it was idiotic. And yet the trial judge elected to fill 30 pages of Vol. 213 Fed. Supp., with an "analysis associated with logic" from which the casual reader might possibly agree that the verdict of the jury was contrary to the great preponderance of the evidence! Instead of evaluating the evidence with subtlety and logic, he should have applied the simple standards of the ordinary reasonable man—the man in the street or digging in the ditches—standards of right, truth and honesty of mind and purpose. By the undisputed evidence of the defendants' own witnesses, Dr. Griffitts, Deputy State Fire Marshal Ragsdale, and National Board of Fire Underwriters special investigator Avery the out-of-court "confessions" of James Nelson were—well in the words of Mr. Henry for the defendant insurance companies—"idiotic."

THE JURY VERDICT AND JUDGMENT THEREON.

An all white jury composed of eleven men and one woman disbelieved Jones and Lee and believed Nelson told the truth on the witness stand rather than on the wire recording taken by Mr. Lee after the sheriff had turned Nelson over to him.

The verdict was returned May 18, 1962. One week later judgment was entered on the verdict. On July 23, 1962 notation was made on the docket by the clerk that, in pursuance to order entered by the court on that date:

> 7-23-62 "Order entered by Judge Frank Gray, Jr., ordering that the judgment entered May 25, 1962, in favor of the United States Fidelity and Guaranty Company and the Insurance Company of North America be, and it is hereby, approved, and the judgment in favor of Helen Corinne Scales Trice, executrix of the will of Joe W. Scales, deceased, be and it is hereby, amended to read as follows:
>
> "Judgment is hereby entered as of May 25, 1962, that the plaintiff, Helen Corinne Scales Trice, executrix of the will of Joe W. Scales, deceased, have and recover of the defendants, Commercial Union Assurance Company, Limited; American National Fire Insurance Company; North British and Mercantile Insurance Company, Limited; New Hampshire Fire Insurance Company; Citizens Insurance Company of New Jersey; Queen Insurance Company of America, and the Home Insurance Company, the sum of $45,000.00 together with interest thereon from June 19, 1957, in the sum of $13,320.00, making a total sum of $58,-320.00, but the defendants shall be entitled to credit against this judgment for all sums paid Thurman Smith, individually or as trustee for the Union Bank of Pulaski, Tennessee, or to the Union Bank of Pu-

laski, Tennessee, on the indebtedness constituting a lien on the property of the plaintiff's testator subject to the mortgage clauses of the defendants' policies. The costs shall be taxed one-fifth against the plaintiff, Helen Corinne Scales Trice, and four-fifths against the above-named defendants." (Attested copy mailed all counsel of record in this action.)

PETITIONER'S APPEAL—JURY VERDICT SET ASIDE.

After petitioner appealed from the portion of the judgment giving the defendants the credit thereon, the judge on December 20, 1962 entered an order setting the verdict aside (seven months after the jury returned the verdict). The judge in his memorandum published in **213 F. Supp., at page 692,** said:

> "The jury could not have been so capricious as to believe Nelson's testimony on the stand, and it was precluded from accepting the reading of his prior deposition during his examination as substantive proof."

What then constituted the "great preponderance" of the evidence against the verdict? We read in the judge's opinion:

> "Considered together, all of Nelson's actions and statements prior to the trial are almost conclusive on reasonable minds that Nelson took part in setting fire to the mill, and it needs only slight corroboration to be utterly convincing that Scales hired him to do it. Such corroboration is abundant, not only in those portions of R. C. Jones' story that are additionally corroborated by Mrs. Jones, but by the massive uncontradicted circumstantial evidence against Scales."

But then, the judge goes on to state:

> "Jones, of course, was seriously discredited by the nature of his own testimony, and by his admitted hos-

tility to Mrs. Trice, and by the obviously good reasons he had for that hostility."[1]

To make entirely plain his reasons for thinking that the weight of the evidence was against the jury's verdict, the judge proceeded to state:

> "Even if the arson issue had to be decided only on the basis of Jones' testimony in court and Nelson's established out-of-court statements versus the plaintiff's rebuttal witnesses, a jury verdict for the defendants would have been fully supported."

One of the circumstances constituting the "massive uncontradicted evidence against Scales", in the judge's opinion, was that the property was **underinsured.** This was a situation, in the mind of the judge, which "was clearly one in which arson could have been profitable"! Some 26 other circumstances were enumerated by the judge, such as:

> "14. Scales was attending a movie at a near-by drive-in theater when the fire broke out, was notified of the fire by the manager, and went immediately to Pulaski to post the $50.00 guarantee required by the city fire department before making fire runs beyond the city limits.
>
> 15. Firemen arrived at the plant expecting to find a source of water in an old basement they had used for that purpose previously and found the basement had been filled in."

Circumstantial "evidence" of this sort, together with the out-of-court statements of James Nelson and the corroboration of these out-of-court statements by Jones, an impeached witness, but who was corroborated to some ex-

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[1] Mrs. Trice, by court decree, had foreclosed the mortgage on the Jones' home, after he had carried his litigation to the State Supreme Court. No other reason for his hostility was shown.

tent by his wife, constituted evidence tending to establish arson, in the judge's opinion, "so ponderous and so slightly rebutted that the jury's verdict cannot be allowed to stand."

To justify his action and to fortify his conclusion that James Nelson's out-of-court statements outweighed his testimony on the witness stand the judge found that Nelson's repudiation was improperly obtained by petitioner and her counsel.

The defendants' lawyers described the methods they used to get testimony for their case when Mr. Lee was on the witness stand being examined by Mr. Henry:

> "Q. Let me clear up one or two things right there, now that have troubled Mr. Farmer for these months and months. It has been suggested there that in a subsequent conversation there with Arthur Watts that we attempted to put the heat on Arthur Watts. Now, Mr. Lee, I want you to tell the Court and jury just exactly what I told Arthur Watts which comes nearer to being heat than anything put on him that day. Tell this jury what I told Arthur Watts.
>
> A. The best I recall it went something like this. You asked Arthur Watts was he ready to shell down the corn? If he didn't, did he want us to go to the Grand Jury or something to that effect.
>
> Q. I asked him, 'Are you ready to shell down the corn or do you want us to go to the Grand Jury?' Beyond that statement made by me, was there any pressure or heat or coercion or threat made against this man, Arthur Watts?
>
> A. Not that I know of.
>
> Q. Now, in all fairness, Arthur Watts never cracked, did he?
>
> A. He did not. He denied that he was involved in it. He denied that he knew James Nelson."

From the face of his opinion it would seem that the judge considered Watt's denials as having no weight whatsoever for, following his sweeping disposition of plaintiff's "impressive array of undependable witnesses," he said:

> "Arthur Watts, whose stout and unbroken denial of guilt barely served to keep his name out of the above findings of fact as an arsonist **for failure of the hearsay declarations of an illiterate farm hand (James Nelson) to meet the defendants' burden of proof.**"

Since James Nelson, on the witness stand, told the jury that the first time he saw Arthur Watts was when Mr. Lee carried him to Nashville after he had taken the statement on the wire recorder at the courthouse in Pulaski, it seems that petitioner with perfect propriety may raise the question, Why were the hearsay declarations of James Nelson which failed to meet the defendants' burden of proof considered by the court as so slightly rebutted that the jury's verdict could not be allowed to stand?

CONDUCT OF PETITIONER'S COUNSEL PROPER.

Petitioner's counsel did not do wrong; he did right.

Justice Samuel F. Miller in the case of **In re Thomas et al. (C. C. D. Colo.), 362 Fed. 242**, declared:

> "The lawyer in this country is one of the administrators of justice. The judge who presides in the court is another, with more authority of position, and, perhaps, in some respects a more burdensome one. But the court, and the clerk, and the marshal, the sheriff, the jury, the lawyer, all constitute ministers of justice; and a lawyer who consciously undertakes to thwart justice is unfit for the position, as much as the judge who accepts a bribe, or knowingly decides a case against the law and the right; and it

should be understood that they are subjected to the same responsibilities."

Further, in his opinion in the **Thomas case**, Justice Miller pointed out that the system of separation of the duties of an attorney and a counselor has not prevailed in this country as in England. He said those admitted to the bar are often sworn in as attorneys and counselors both and perform the functions of both; and so the lawyer is often compelled for himself to have interviews with his own witnesses to ascertain what they will testify to in the matter. He said:

". . .; and in the same way he must seek, either from his client or somebody else, to know what will be the case against him."

By canon 39 of Canons of Professional Ethics of the American Bar Association is as provided:

"39. Witnesses.

A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand."

American Jurisprudence 2d, Desk Book, p. 232.

The United States Court of Appeals for the Eighth Circuit in **Harrington et al. v. United States 267 Fed. 97, 101** declared:

"There was evidence to show that Scattergood called on Mrs. Pittman at Creston, Iowa, and endeavored to have her make a statement in writing,

before a notary public, which would contradict what she had said before the grand jury; but there was no evidence tending to show that Scattergood was consciously attempting to obtain a statement of a falsehood. The contents or substance of the statement which Scattergood solicited Mrs. Pittman to make and sign are not disclosed, except that it would be contradictory of her testimony given before the grand jury. Even though Mrs. Pittman had testified before the grand jury to facts that would have shown Anderson guilty of a crime under the White Slave Act, it was Scattergood's privilege to disbelieve her, and to believe the version of the facts told by his client, Anderson, and to so believe, although she maintained that she had told the truth. **It is not an unlawful attempt to influence or impede a witness, or the due administration of justice, for one to seek to obtain from a witness a statement of the facts as he believes them to be, without the exercise of undue influence, even though such a statement may conflict with prior testimony given by the one making the statement.** Such an effort is not regarded with favor, because of the temptation to influence the witness unduly; but the mere request for a statement believed to be true does not offend against the statute under which this indictment was drawn, because it is not corrupt conduct." (Emphasis added.)

Was it improper for petitioner's counsel to inform James Nelson that he had been indicted for arson on the statement defendants' attorney had obtained from him? Mr. Lee was listed as a state's witness on the back of the indictment. Mr. Lee denied that he went before the grand jury. James Nelson testified that Mr. Lee did not tell him what he was going to do with what he was taking down on the machine. "He just told me," he testified, "that it didn't amount to anything."

Counsel for the insurance companies tried to make James Nelson say that petitioner's counsel, in typing the statement down at the home of Mr. and Mrs. Jones Boyd, put words in his mouth. James Nelson denied this. He said the statement contained exactly what he said and that petitioner's counsel did not tell him what to say. Mr. and Mrs. Boyd corroborated him in every respect. Defendants' counsel, upon the discovery deposition of Sheriff Butler being taken, proved by him that Mr. and Mrs. Boyd were upright, honorable people.

Therefore, although the judge found that petitioner's counsel's conduct was improper, he found no facts which would render it improper. His conclusion is not warranted by the facts found.

It was misconduct, in the eyes of the judge, for petitioner's counsel to call for a resumption of the deposition of James Nelson without telling opposing counsel that Nelson had changed his story. Defendants' counsel, however, did not claim that they were misled. They did not claim that they did not learn immediately after James signing the recantation statement and his visit to the District Attorney General that he had recanted. It was shown that within two or three days after Nelson's recantation, one of defendants' attorneys and the sheriff were back down to see him and the sheriff told him he had better say he burned the mill for if he did not they would send him to the penitentiary.

The judge, in his opinion, declared:

> "This conduct was improper, whether knowingly so or not, and in view of the very strong case of arson made out by the defendants by other evidence, the court cannot say that the results of this improper conduct did not gain his client an unfair advantage that resulted in the jury's verdict against the defendants on the arson issue.

"Accordingly, prejudice has clearly been shown. The verdict must therefore be set aside and a new trial granted on the issues of arson and the good or bad faith of the plaintiff.

"It will not be necessary to discuss here the other allegations relating to the conduct of the plaintiff's counsel on the trial, but the court deems it pertinent to discuss in this context a matter brought up by plaintiff's counsel in one of his post-trial briefs."

One of the grounds of the defendants' motion for a new trial was:

"17. The persistent misconduct of the counsel for the plaintiff, Helen Scales Trice, Executrix, in frequent and consistent mis-statements of fact and proof to the jury operated to the prejudice of these defendants and in favor of the plaintiff."

The motion for a new trial contains no specification of this "persistent misconduct of counsel for plaintiff." The judge supplied that deficiency apparently by finding a mis-statement in a post-trial brief.

And the Court of Appeals said they had examined the record and found no abuse of discretion by the trial judge since there was "substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in procuring the burning of the subject property."

Petitioner, in her petition to rehear in the Court of Appeals challenged the foregoing statement by the Court of Appeals and demanded that the court give a specification of the "substantial evidence." The Court of Appeals answered merely: "Petition to Rehear Denied."

PETITIONER ASKS THIS COURT: WHERE HAS JUSTICE GONE, THAT SHE AND HER COUNSEL IS TREATED IN THIS MANNER?

The judge had before him as part of the record the discovery deposition of Pink Butler, the sheriff, in which he related how he softened up James Nelson back in the little room in the courthouse and then turned him over to defendants' attorneys telling them he was ready to talk, though James had not opened his mouth.

In the view of the judge, it was all right for the defendants' lawyers to have Arthur Watts brought into the office of the State Fire Marshal and ask him whether he was going to "shell out the corn" or whether he wanted them to go before the grand jury. (Which they did after he refused to "shell out the corn.") It was all right to obtain the friendly offices of the sheriff in obtaining a confession from James Nelson, while telling him it didn't amount to anything, and then use the confession as the basis for an indictment against him for arson. It was all right to use the sheriff again to go back to Nelson after he had repudiated the confession and tell him that if he didn't go on and say he burned the mill, "they" would put him in the penitentiary. It was all right for defendants' lawyers, after all the mistreatment of James to go down to see him again on the eve of the trial and remind him that the penalty of perjury in the Federal court was the penitentiary.

Judicial knowledge may be taken, we believe, of the fact that there is a type of mind in some states which considers the testimony of an illiterate Negro farm hand as weightless as an object in orbit in space if he is contradicting the word of a white lawyer. Be it said to the credit of Tennessee, however, that the jury which heard this case all had a different mind.

THE DOORS OF THE COURT OF JUSTICE BARRED.

Petitioner asks the Court to consider, for a moment, the judge's finding that the conduct of petitioner's counsel in taking the statement from James Nelson repudiating his confession may have gained petitioner "an unfair advantage that resulted in the jury's verdict against the defendants on the arson issue." Let us suppose the case is tried a second time and James Nelson is put on the stand by the defendants to prove that he at one time confessed to burning the mill but had repudiated his confession when petitioner and her counsel, with Mr. and Mrs. Boyd, talked to him. If the ruling of the judge on the first case is unreversed and it is urged that it has become the law of the case, would not the judge—even if it be a different judge from the one who tried the case the first time—set the second verdict for petitioner aside on the ground of her counsel's "misconduct" in taking the recantation from Nelson. Petitioner is afraid that unless this Court grants certiorari and corrects the erroneous ruling of the trial judge on this first appeal, the doors of the court below have been permanently closed to her.

LIND v. SCHENLEY INDUSTRIES, INC.

It seems to petitioner that the decision of the courts below is in conflict with the rule declared by the Court of Appeals for the Third Circuit in the leading case of **Lind v. Schenley Industries, Inc., 278 F. 2d 79, reversing 167 F. Supp. 590, cer. den. 364 U. S. 835, 81 S. Ct. 58, 5 L. ed. 60.** The rule laid down by the Court of Appeals for the Third Circuit in that case is that where the subject matter of the litigation is simple and easily comprehended by any intelligent layman and the case turns upon the credibility of the witnesses, the trial judge has no right

to substitute his judgment for that of the jury and therefore abuses his discretion in setting aside the verdict and granting a new trial.

Because of the great importance of the **Lind case**, we quote from the majority opinion as follows:

> [16] The remaining basis for ordering a new trial is that the verdict was against the weight of the evidence. It is frequently stated that a motion for a new trial on this ground ordinarily is nonreviewable because within the discretion of the trial court. Montgomery Ward & Co. v. Duncan, 1940, 311 U. S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147; Zegan v. Central R. Co., 3 Cir., 1959, 266 F. 2d 101; Menneti v. Evans Construction Co., 3 Cir., 1958, 259 F. 2d 367. But this discretion must still be exercised in accordance with ascertainable legal standards and if an appellate court is shown special or unusual circumstances which clearly indicate an abuse of discretion in that the trial court failed to apply correctly the proper standards, reversal is possible. See e. g. Indamer Corporation v. Crandon, 5 Cir., 1954, 217 F. 2d 391. Concededly appellate courts rarely find that the trial court abused its discretion.
>
> In Commercial Credit Corp. v. Pepper, 5 Cir., 1951, 187 F. 2d 71, 75-76, Judge Borah stated: "It is a principle well recorgnized in the federal courts that the granting or refusing of a new trial is a matter resting within the discretion of the trial court. The term 'discretion', however, when invoked as a guide to judicial action, means a sound discretion, exercised with regard to what is right and in the interests of justice. And an appellate court is not bound to stay its hand and place its stamp of approval on a case when it feels that injustice may result. Quite to the contrary, it is definitely recognized in numerous deci-

sions that an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error." Thus an appellate court must still rule upon the propriety of an order for a new trial, even though the grounds for reversal are exceedingly narrow. But before any rational decision can be made, the reviewing court must know what standards the trial judge is bound to apply when ruling upon a motion for a new trial. These standards necessarily vary according to the grounds urged in support of the new trial. There is, however, little authority on what standards are to be applied in ruling on a motion for new trial on the grounds that the verdict is against the weight of the evidence beyond the simple maxim that the trial judge has wide discretion. The few available authorities are conflicting. Professor Moore concludes that while the trial judge has a responsibility for the result at least equal to that of the jury he should not set the verdict aside as contrary to the weight of the evidence and order a new trial simply because he would have come to a different conclusion if he were the trier of the facts. Professor Moore states in this connection: "[S]ince the credibility of witnesses is peculiarly for the jury it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict. The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts, and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not."

Professor Moore's views are logical and persuasive and buttressed by some decisional authority. See Werthan Bag Corp. v. Agnew, 6 Cir., 1953, 202 F. 2d 119, 122 (question of damages). In the same vein, Schirra v. Delaware, L. & W. R. Co., D. C. M. D. Pa. 1952, 103 F. Supp. 812, 820, holds that if "there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion, and it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." Pelham v. Hendricks, D. C. M. D. Pa. 1955, 132 F. Supp. 774, 775, goes further, ruling that: "The evidence and inferences reasonably deducible therefrom must be viewed in the light most favorable to the prevailing party, and the Court must assure that the jury followed the Court's instructions."

Miller v. Pacific Mut. Life Ins. Co., D. C. W. D. Mich. 1954, 17 F. R. D. 121, 125; American Cooler Co. v. Fay & Scott, D. C. D. Me. 1937, 20 F. Supp. 782, 783, and United States v. 13.40 Acres of Land, D. C. N. D. Cal. 1944, 56 F. Supp. 535, 538, go farther in restricting the discretion of the trial judge for these authorities hold that the jury's verdict may not be set aside and a new trial ordered merely because the verdict is contrary to the preponderance of the evidence. The first and second of the three cases cited hold that the verdict "must be so manifestly and palpably against the evidence in the case as to compel the conclusion that the verdict is contrary to right and justice." And the third opinion cited states that a new trial may not be ordered unless, "The evidence as a whole, after according to it the highest probative force to which it is lawfully entitled, is insufficient to support the verdict." Judge Yankwich took a similar restricted view of his own discretion in ordering a new trial because the verdict was contrary to

the weight of the evidence. In Lyophile-Cryochem Corp. v. Cutter Laboratories, Inc., D. C. N. D. Cal. 1948, 78 F. Supp. 903, he recognized that a motion for a new trial may be granted if the trial judge is satisfied that the verdict was against the preponderance of the evidence but he took the position that the trial judge should not substitute his judgment on the facts for that of the jury except in extreme circumstances.

But there is also some authority supporting an almost unlimited discretion in the trial judge in granting or denying a motion for a new trial. In Murphy v. United States District Court for Northern District of California, Southern Division, 9 Cir., 1944, 145 F. 2d 1018, 1020, the Court of Appeals upheld the granting of a new trial by Judge Goodman in United States v. 13.40 Acres of Land, supra. The appellate court found the trial judge's discretion in such matters was wider than did Judge Goodman himself. The appellate tribunal said that "The granting of a new trial is discretionary with the court and subject to no fixed rule except a consideration of what is just." But the exception stated is itself a potent one. The case of Grayson v. Deal, D. C. N. D. Ala. 1949, 85 F. Supp. 431, stands for the proposition that the court may consider the evidence as a whole and weigh it, and if it considers that the jury was mistaken or that its verdict was wrong, although supported by evidence, a new trial should be granted.

What we have stated demonstrates that there is no consensus of opinion as to the exact standards to be used by a trial court in granting a new trial and that the criteria to be employed by an appellate tribunal charged with reviewing the trial judge's decision in this respect are equally indefinite. New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new

trials ordered for other reasons: for example, evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible. In the latter instances, (2), supra, the trial court delivered the jury from a possibly erroneous verdict arising from circumstances over which the jury had no control. Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial.

[17] But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence. The trial judge in negating the jury's verdict has to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a

close scrutiny is required in order to protect the litigants' right to jury trial.

[18] Where a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors a verdict should be scrutinized more closely by the trial judge than is necessary where the litigation deals with material which is familiar and simple, the evidence relating to ordinary commercial practices. An example of subject matter unfamiliar to a layman would be a case requiring a jury to pass upon the nature of an alleged newly discovered organic compound in an infringement action. See 3 Walker on Patents, Deller's ed., Section 697. A prime example of subject matter lying well within the comprehension of jurors is presented by the circumstances at bar.

[19] The subject matter of the litigation before us is simple and easily comprehended by any intelligent layman. The jury's main function was to determine the veracity of the witnesses: i. e., what testimony should be believed. If Lind's testimony and that of Mrs. Kennan, Kaufman's secretary, was deemed credible, Lind presented a convincing, indeed an overwhelming case. We must conclude that the jury did believe this testimony and that the court below substituted its judgment for that of the jury on this issue and thereby abused its legal discretion.

The judgment of the court below will be reversed and the case will be remanded with the direction to the court below to reinstate the verdict and judgment in favor of Lind.

There was a dissent by two of the judges of the Court of Appeals for the Third Circuit in the **Lind case**. Shepherd's Citations, however, shows that the rule of the case has been consistently and frequently applied since

that time in the district courts for Pennsylvania. These later district court decisions are:

Kowatch v. Rudnik (W. D. Pa.), 193 F. Supp. 466, 469;

Jamison v. Di Nardo, Inc. (W. D. Pa.), 195 F. Supp. 99, 102;

John Cola, Jr. v. Penn. Ry. Co. (W. D. Pa.), 213 F. Supp. 122, 123;

Marine Towing Co., Inc. v. Fairbanks, Morse & Co. (E. D. Pa.), 225 F. Supp. 467, 469;

Gray v. Alpert (W. D. Pa.), 220 F. Supp. 886, 890;

Berguido v. Eastern Airline, Inc. (E. D. Pa.), 35 F. R. D. 200;

Snyder v. Macaluso (W. D. Pa.), 204 F. Supp. 370.

In **Bennett v. D. C. Transit System, Inc. (C. A. D. C.), 298 F. 2d 325**, Judge Fahy, dissenting from the majority, followed the **Lind** rule, saying:

> I concur in reversing the judgment entered in favor of the Transit Company notwithstanding the verdict of the jury in favor of the plaintiff. I would not, however, grant a new trial but would direct reinstatement of the jury verdict and entry of judgment for the plaintiff. The crucial question was whether the jury would credit the testimony of the plaintiff and her small son as to the happening of the accident when they were unsuccessfully attempting to board a bus of the Company. This testimony in substance was that the door of the bus temporarily caught plaintiff's leg. The bus driver did not see the alleged accident, and neither he nor any passenger who remained on the bus reported it. Plaintiff, however, notified the Company the same day, and the matter was then investigated by the Company.
>
> The defense was an attack on the credibility of plaintiff and her child, so that the case posed a clas-

sical jury question, which the jury answered. It is in derogation of the jury function, as it seems to me, for the conclusion they reached, attributable to no error of law, not to be given effect. See Lind v. Schenley Industries, Inc., 278 F. 2d 79, 87-91 (3rd Cir., 1960), cert. denied 364 U. S. 835, 81 S. Ct. 78, 5 L. Ed. 2d 60, where following a thorough discussion, the opinion states in part:

> "But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial."

278 F. 2d at 90. The court then pointed out that since the case turned upon credibility, an issue which was resolved by the jury, the grant of the new trial constituted an abuse of the court's "legal discretion," requiring reinstatement of the verdict of the jury.

Our case is even clearer than Lind, for here the learned trial judge thought plaintiff made no case for the jury. He accordingly granted judgment for the

> defendant, n. o. v. This court now holds there was a case for the jury; that is, that the evidence was sufficient to enable the jury to find for the plaintiff. No gaps need to be filled to make out a jury question which could be, as it was decided favorably to the plaintiff.

The majority of the Court of Appeals for the District of Columbia in the above case felt inclined to indulge every possible presumption that the trial judge had a valid reason for granting a new trial. They did not, however, affirm his action upon the ground that he was entitled to substitute his judgment as to the credibility of witnesses for the jury and grant a new trial on that ground.

There are cases in other circuits where the appellate court has refused to reverse a trial judge for granting a new trial where he has weighed the evidence and found that the weight of the evidence is against the verdict. If he declares that, without disclosing what the evidence is and without showing how he did the weighing, appellate courts have no way of determining whether there was an abuse of discretion without themselves weighing the evidence independently. This, of course, is not a function of an appellate court.

But, where, as here, the trial judge publishes a memorandum setting forth the grounds of his decision and showing minutely how he weighed the evidence and it is apparent from the face of his opinion that he acted without any sound reason, then the appellate court is not limited to examining the record to see if there is any substantial evidence that would have supported a contrary verdict of the jury and affirming the action on the trial judge for this reason. Where, as here, it is obvious from a mere reading of the trial judge's memorandum that there was conflict in the evidence, that the matter or issue in litigation was simple and easily to be comprehended by

any layman of average intelligence, and the judge states that he is substituting his own view of credibility for the judgment of the jury, then an appellate court can have no trouble declaring that the judge erred in matter of law and abused his discretion, which was a legal and not an arbitrary one.

FAILURE AND REFUSAL OF COURT OF APPEALS TO PASS ON THE QUESTIONS RAISED BY PETITIONER ON HER APPEAL.

These questions are set out in petitioner's petition at pages 22 to 28. Respondents' brief fails to show any good reason for the refusal of the Court of Appeals to pass on these questions. The Court of Appeals' reason is not sound. Petitioner filed in the Court of Appeals a petition to rehear, asserting:

> "Appellant says it was the duty of this Court to pass upon the other issues raised in her brief concerning the action of the trial judge in granting the new trial to the defendant insurance companies because they show clear errors of law which are reviewable on appeal from the granting of the new trial and were in no way disposed of by the review of the record made by the Court as the result of which it was concluded that the insurance companies had introduced 'substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he had not participated in procuring of the burning of the subject property.'"

The Court of Appeals denied the petition to rehear without deciding the questions.

It seems to petitioner that the affirmance of the action of the trial judge in granting a new trial on the ground that no abuse of discretion was shown **while refusing to**

even consider the grounds asserted as being the abuse of discretion and lack of power and jurisdiction and the other questions of law raised by petitioner in her brief on appeal is wholly without justification. It is about the same thing as depriving a litigant of his day in court.

Let us take up just one question raised by petitioner that was not decided by the Court of Appeals to show how the Court of Appeals has failed in the performance of its duty. Petitioner asserted that it affirmatively appears from the court's Memorandum that the new trial was granted solely because the court thought a different inference from conflicting evidence was more reasonable than the one the jury drew. Now, the Court of Appeals for the Sixth Circuit itself in **Werthan Bag Co. v. Agnew, 202 F. 2d 119, 122,** declared that the rule of the Tennessee state courts that the trial judge is a 13th juror does not apply in the Federal courts sitting in the state and said:

> "And since the credibility of witnesses is peculiarly for the jury it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict."

Under this rule it is an abuse of the trial court's discretion to grant a new trial merely because the evidence was sharply in conflict and the court took a different view of credibility of the witnesses from that taken by the jury. Does the fact that there is substantial evidence which would have supported a verdict meeting the court's approval justify the court in granting a new trial? Clearly not. Does it justify the Court of Appeals in refusing to decide the issue whether the grant of a new trial was an invasion of the jury's province (and, therefore, an abuse of discretion) because his opinion on its fact shows that the evidence was in conflict and he differed with the jury on the credibility of the witnesses? If so, the rule is unenforcible. It means trial judges are not bound by it if they exercise discretion not to be.

We believe the Court can see why we complain of the refusal of the Court of Appeals to decide the issues raised by petitioner on her appeal. The other questions raised which were not passed on are equally good and strong and clear.

Justice is thwarted when courts will not permit litigants to present the cases or refuse to decide on the cases when they are properly presented.

Respectfully submitted,

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